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Bulletin

August 2009

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Policy (211)

Van Valkenburg v. Shinseki

In *Van Valkenburg v. Shinseki*, U.S. Vet. App. No. 07-2670 (July 24, 2009), the appellant, Mrs. Van Valkenburg, sought entitlement to an effective date earlier than March 7, 1995, for an award of dependency and indemnity compensation (DIC).

Her husband, the Veteran, died in December of 1984. There was no dispute that the Appellant filed a claim with VA for DIC in March 1995, but there was considerable confusion as to whether an earlier claim had been filed with the Social Security Administration (SSA), which could give rise to an earlier effective date. Mrs. Van Valkenberg had been in receipt of SSA survivor benefits since the death of her husband. Ultimately, the Court of Appeals for Veterans Claims (CAVC) reversed the Board's factual finding that the preponderance of evidence weighed against a finding that the Appellant had filed a form or application that could support an earlier date. The Court remanded the matter to assign an effective date of December 1, 1984, the first day of the month in which the Veteran died.

All stations are reminded that under the provisions of 38 U.S.C. § 5101(a), 38 CFR 3.152(a) and 3.153, an application on a form jointly prescribed by the Secretary and the Commissioner of Social Security filed with the Social Security Administration (SSA) on or after January 1, 1957, will be considered a claim for death benefits, and to have been received in the Department of Veterans Affairs as of the date of receipt in Social Security Administration. VA and SSA have the jointly prescribed form *SSA-24, Application for Survivor's Benefits*, for that purpose. The receipt of such an application (or copy thereof) by the Department of Veterans Affairs will not preclude a request for any necessary evidence.

Adjudicators should be cognizant of this holding and review the record carefully for any indication of a claim for survivor benefits from SSA. Development should be done to determine the date of any such claim and to consider that application when establishing the effective date for death benefits.

A Decision Assessment Document (DAD) will be released in the near future.

Pending Rulemakings

Herbicide Exposure and Veterans with Covered Service in Korea

On July 24, 2009, VA published a proposed rulemaking in the Federal Register to amend various regulations to add provisions concerning herbicide exposure of certain Veterans who served in or near the Korean DMZ. The proposed rulemaking would amend 38 CFR 3.307 to add a presumption of exposure for Veterans with such "covered" service in Korea. It would also amend 38 CFR 3.814 and 3.815 regarding spina bifida for their children. See 74 FR 36640. Comments pertaining to the proposed rulemaking must be received on or before September 22, 2009. **Important:** Comments from VA employees in response to proposed rulemakings may not be considered if sent via government email, using government computers, or on government time. VA employees are free to comment on pending rulemakings as private citizens, but may not mention their VA employee status in the comment.

Stressor Determinations for PTSD

C&P Service is drafting a proposed rulemaking that would amend 38 CFR 3.304 by adding a new paragraph (f)(3) that would liberalize the evidentiary standard for establishing the required in-service stressor. This rulemaking would eliminate the requirement for corroborating that the claimed in-service stressor occurred if a stressor claimed by a Veteran is related to the Veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of PTSD. Through the concurrence process, issues pertaining to this proposed regulation have been addressed,

including the projected number of expedited claims and expected minimal costs. This rule is expected to be published in the Federal Register Monday, August 24, 2009.

Requesting DeLuca Factors on Dental and Oral Examinations for Temporomandibular Joint (TMJ) Disorders

C&P Service has received multiple questions regarding the application of the *DeLuca* factors in evaluating disability resulting from Temporomandibular Joint (TMJ) disorders. The Board of Veterans' Appeals (Board) has remanded claims for new examinations including consideration of *DeLuca* as relating to TMJ disorders. Although the *DeLuca* decision was predicated in large part on the provisions of 38 CFR 4.40 and 4.45, which are part of the rating schedule for musculoskeletal conditions, and TMJ disorders are coded and evaluated under the "Dental and Oral Conditions" part of the schedule, the temporomandibular joints are clearly musculoskeletal joints and the evaluation of the TMJ is based on loss of motion. Therefore, the provisions of the *DeLuca* decision must also be applied to the evaluation of diagnostic code 9905, temporomandibular articulation, limited motion of.

Until the Policy Staff is able to adequately revise the Dental and Oral Conditions Examination Worksheet, examination requests for evaluation of TMJ conditions under diagnostic code 9905 should include specific instructions to the examiner addressing the *DeLuca* factors. The examiner should be asked to address the following:

"Impairment of joint function is determined by actual range of joint motion as reported in the physical examination and additional limitation of joint function during flare-ups or following repetitive motion caused by the following factors:

- Pain, including pain on repeated use
- Fatigue
- Weakness
- Lack of endurance
- Incoordination

Do any of the above factors additionally limit joint function? If so, express the additional limitation in millimeters of inter-incisal range or lateral excursion.

Indicate if you cannot determine, without resort to mere speculation, whether any of these factors cause additional functional loss. For example, indicate if you would need to resort to mere speculation in order to express additional limitation due to repetitive use."

Further Information on Handling Herbicide Related Claims from Veterans with Thailand Service During the Vietnam Era

Information on the development of herbicide related claims from Veterans with service in Thailand during the Vietnam Era was provided in C&P Service Fast Letter (FL) 09-20, *Developing for Evidence of Herbicide Exposure in Haas-Related Claims from Veterans with Thailand Service during the Vietnam Era*. A memorandum for the case file was also provided to serve as a substitute for sending an inquiry to the Agent Orange Mailbox. Among other things, this memorandum acknowledges that an official 1973 report of military base defense in Thailand, known as the CHECO Report, provides evidence that herbicides were used within the fenced perimeters of airbases throughout Thailand. Because of this evidence, the memorandum advises Regional Offices of the likelihood that airbase security personnel who patrolled the perimeters, and especially security dog handlers, were exposed to the

herbicides present in the fenced areas. To promote consistency in the evaluation of these types of claims, C&P Service has developed the following policy:

When a Veteran with Thailand service during the Vietnam Era files a disability claim based on herbicide exposure and service records show that the Veteran's military occupational specialty (MOS) was Security Policeman or Security Dog Handler, or the Veteran had another MOS that would have required work near the airbase perimeter, VA regional offices should e-mail the Agent Orange Mailbox with a summary of the evidence contained in the claims files. C&P Service will then review the claim to determine the likelihood of herbicide exposure based on the facts of the case and available Department of Defense documents. Only these types of claims will need a review by C&P Service. The memorandum provided with FL 09-20 will continue to serve as a substitute for the Agent Orange Mailbox response in all other herbicide related claims from Veterans with Thailand service.

Procedures (212)

Disability Evaluation System (DES) Pilot Home Page

C&P Service has created a [Disability Evaluation System \(DES\) Pilot home page](#) under *Procedures* on the C&P Intranet home page. The site has links to important DES Pilot documentation, including the workflow guide on the Disability Evaluation System (DES) Pilot Paperless Delivery of Veterans Benefits and the [Disability Evaluation System \(DES\) Pilot Program Implementation Guide](#). The latter outlines procedures unique to the DES Pilot process. DES Rating Activity Sites (D-RAS), Military Service Coordinators, and other DES Pilot personnel are responsible for implementing the procedures contained within the

implementation guide, effective immediately. If there are questions or comments about the guide, please e-mail VAVBAWAS/CO/DES.

For more information regarding the DES Pilot, please see [Fast Letter 08-01, The Joint VA-Department of Defense \(DOD\) Disability Evaluation System \(DES\) Pilot Program](#), dated January 30, 2008. For more information on DES Rating Activity Sites, please see [Fast Letter 09-16, Transfer of Disability Rating Activity Site, \(DRAS\) Jurisdiction in the Disability Evaluation System \(DES\) Pilot](#), dated March 4, 2009.

Fast Letter (FL) 09-30, Handling Economic Recovery Payment Inquiries

On July 13, 2009, C&P Service released [Fast Letter \(FL\) 09-30, Handling Economic Recovery Payment Inquiries](#). As stated in June 2009, VA began releasing the one-time \$250 Economic Recovery Payments (ERPs) on June 18, 2009. This FL provides information to National Call Centers, Regional Offices, and the Nashville ERP Team on how to process inquiries regarding the non-receipt of ERP.

Fast Letter (FL) 09-32, Fast Letter and Training Letter Rescissions

On July 22, 2009, C&P Service released [Fast Letter \(FL\) 09-32, Fast Letter and Training Letter Rescissions](#). This FL identifies Compensation and Pension Service Fast Letters (FLs) and Training Letters (TLs) from 1995 to 2007 that are no longer necessary to provide the operational or procedural instructions for which they were initially created. As a result, these letters were rescinded effective July 22, 2009, and have updated both the FL and TL Intranet pages to reflect these rescissions.